

Assembly Bill No. 5

Passed the Assembly December 18, 2008

Chief Clerk of the Assembly

Passed the Senate December 18, 2008

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2008, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 143 of the Streets and Highways Code, relating to transportation.

LEGISLATIVE COUNSEL'S DIGEST

AB 5, Evans. Transportation projects.

(1) The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on a project, as defined, that it proposes to carry out or approve that may have a significant effect on the environment, or to adopt a negative declaration if it finds that the project will not have that effect. The act exempts from its provisions, among other things, certain types of ministerial projects proposed to be carried out or approved by public agencies, and emergency repairs to public service facilities necessary to maintain service.

This bill would, until January 1, 2011, exempt from CEQA specified transportation projects if certain conditions are met. Because a lead agency would be required to determine the applicability of, and to give notice of, that exemption, this bill would create a state-mandated local program.

(2) Existing law authorizes the Department of Transportation and regional transportation agencies, as defined, until January 1, 2012, to enter into comprehensive development lease agreements with public and private entities, or consortia of those entities, for certain transportation projects that may charge certain users of those projects tolls and user fees, subject to various terms and requirements. Existing law limits the number of projects authorized pursuant to these provisions to 2 in northern California and 2 in southern California.

This bill would extend the authorization for these agreements to January 1, 2014, and would increase the number of projects authorized to 5 projects in northern California and 5 projects in southern California. The bill would require the projects to be primarily designed to achieve improved mobility, improved operations or safety, and quantifiable air quality benefits.

Existing law requires that the negotiated lease agreements be submitted to the Legislature for approval or rejection. Under existing law, the Legislature has 60 legislative days to act after submittal of the agreement and the agreement is deemed approved unless both houses of the Legislature concur in the passage of a resolution rejecting the agreement. Existing law prohibits the Legislature from amending these lease agreements.

The bill would eliminate that prohibition and the provision requiring approval or rejection by the Legislature. The bill would require that all lease agreements be submitted to the Legislature and the Public Infrastructure Advisory Commission, as defined, for review, as specified. The bill would also require the Public Infrastructure Advisory Commission to perform specified acts and would authorize that commission to charge the department and regional transportation agencies a fee for specified services.

Existing law authorizes the department and regional transportation agencies to utilize various procurement approaches, including, among other things, acceptance of unsolicited proposals, as specified.

This bill would prohibit the department or a regional transportation agency from awarding a contract to an unsolicited bidder without receiving at least one other responsible bid.

Under existing law, for these projects, tolls and user fees may not be charged to noncommercial vehicles with 3 or fewer axles.

This bill would eliminate that prohibition.

Existing law imposes various contract requirements for these projects, including permitting compensation for a leaseholder for losses in toll or fee revenues in certain instances if caused by the construction of supplemental transportation projects, but prohibits the compensation to exceed the reduction in revenues.

This bill would prohibit that compensation from exceeding the lesser of the reduction in revenues or the amount necessary to cover the costs of debt service, as specified. The bill would additionally require the agreements to include an indemnity agreement, as specified, and to authorize the contracting entity to utilize the design-build method of procurement for transportation projects, subject to specified conditions. The bill would also require contracting entities or lessees to have specified qualifications.

The bill would authorize the department or the regional transportation agency, when evaluating a proposal submitted by

a contracting entity or lessee, to award a contract on the basis of the lowest bid or best value, as defined.

The bill would enact other related provisions.

(3) This bill would specify that these provisions shall not become operative unless AB 2 of the 2009–10 First Extraordinary Session is enacted and becomes operative.

(4) The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on December 1, 2008.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on December 1, 2008, pursuant to the California Constitution.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. (a) For the purpose of this section, “transportation project” means any of the following:

(1) United States Route 101 improvement project from Interstate 280 to Yerba Buena Road in Santa Clara County.

(2) North Coast Corridor-Stage 1A project in San Diego County on Interstate 5 from San Dieguito River Bridge to San Elijo Lagoon Bridge, and on Interstate 805 from the Carroll Canyon Undercrossing to Interstate 5, to construct high-occupancy vehicle lanes and other operational improvements.

(3) Los Molinas improvement project on State Route 99 from Orange Street to Tehama Vina Road in Tehama County.

(4) Auxiliary lanes project on State Route 99 from Calvine Road to Mack Road in Sacramento County.

(5) Island Park widening project on State Route 99 from Ashland Avenue to Avenue 7 in Fresno County.

(6) Sacramento Intermodal track relocation project in San Joaquin County.

(7) United States Route 101 rehabilitation project in San Luis Obispo County.

(8) United States Route 101 Doyle Drive project in the City and County of San Francisco.

(b) Except as otherwise provided in paragraph (1), Division 13 (commencing with Section 21000) of the Public Resources Code does not apply to a transportation project if all of the following conditions are met:

(1) In the same manner and to the same extent as required under Division 13 (commencing with Section 21000) of the Public Resources Code, the Department of Transportation does all of the following:

(A) Identifies, reviews, and considers the significant and potentially significant environmental effects of the transportation project, including, but not limited to, those environmental effects associated with air pollution, greenhouse gas pollution, and community enhancements.

(B) Evaluates feasible alternatives to the project.

(C) Mitigates the significant and potentially significant environmental effects.

(2) The Department of Transportation conducts outreach efforts in the vicinity of the project to ensure public awareness of proposed repair work prior to approval of the project.

(3) The Department of Transportation and any contractors it uses for the transportation project comply with standard construction practices, including, but not limited to, any rules, guidelines, or regulations adopted by the State Air Resources Board or applicable air district for construction equipment.

(4) The Department of Transportation and any contractors it uses comply with any applicable measures for control of particulate matter emissions recommended by an air district or the State Air Resources Board.

(5) Where feasible, the Department of Transportation and any contractors it uses use equipment powered by emulsified diesel fuel, electricity, natural gas, or ultra-low sulfur diesel as an alternative to conventional diesel-powered construction equipment.

(c) This section shall not be construed to overturn a final judgment entered by a court of law prior to the effective date of this section.

(d) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 2. Section 143 of the Streets and Highways Code is amended to read:

143. (a) (1) “Best Value” means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the department or the regional transportation agency.

(2) “Design-build” means a procurement process in which both the design and construction of a project are procured from a single entity.

(3) “Regional transportation agency” means any of the following:

(A) A transportation planning agency as defined in Section 29532 or 29532.1 of the Government Code.

(B) A county transportation commission as defined in Section 130050, 130050.1, or 130050.2 of the Public Utilities Code.

(C) Any other local or regional transportation entity that is designated by statute as a regional transportation agency.

(D) A joint exercise of powers authority as defined in Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, with the consent of a transportation planning agency or a county transportation commission for the jurisdiction in which the transportation project will be developed.

(4) “Public Infrastructure Advisory Commission” means a unit or auxiliary organization established by the Governor’s Office of Planning and Research that advises the department and regional transportation agencies in developing transportation projects through performance based infrastructure partnerships.

(5) “Transportation project” means one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies that is consistent with the requirements of subdivision (c).

(b) (1) The Public Infrastructure Advisory Commission shall do all of the following:

(A) Identify transportation project opportunities throughout the state.

(B) Research and document similar transportation projects throughout the state, nationally, and internationally, and further identify and evaluate lessons learned from these projects.

(C) Assemble and make available to the department or regional transportation agencies a library of information, precedent, research, and analysis concerning infrastructure partnerships and related types of public-private transactions for public infrastructure.

(D) Advise the department and regional transportation agencies, upon request, regarding infrastructure partnership suitability and best practices.

(E) Provide, upon request, procurement-related services to the department and regional transportation agencies for infrastructure partnership.

(2) The Public Infrastructure Advisory Commission may charge a fee to the department and regional transportation agencies for the services described in subparagraphs (D) and (E) of paragraph (1), the details of which shall be articulated in an agreement entered into between the Public Infrastructure Advisory Commission and the department or the regional transportation agency.

(c) (1) Notwithstanding any other provision of law, only the department, in cooperation with regional transportation agencies, and regional transportation agencies, may solicit proposals, accept unsolicited proposals, negotiate, and enter into comprehensive development lease agreements with public or private entities, or consortia thereof, for transportation projects.

(2) The number of projects authorized pursuant to this section shall be limited to five projects in northern California and five projects in southern California. The California Transportation Commission shall select the candidate projects from projects nominated by the department or a regional transportation agency. No fewer than two of the selected projects shall be nominated by a regional transportation agency.

(3) The projects authorized pursuant to this section shall be primarily designed to achieve all of the following performance objectives:

(A) Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.

(B) Improve the operation or safety of the affected corridor.

(C) Provide quantifiable air quality benefits for the region in which the project is located.

(4) In addition to meeting the requirements of paragraph (3), the projects authorized pursuant to this section shall address a known forecast demand, as determined by the department or regional transportation agency.

(5) At least 60 days prior to executing a final lease agreement authorized this section, the department or regional transportation agency shall submit the agreement to the Legislature and the Public Infrastructure Advisory Commission for review. Prior to submitting a lease agreement to the Legislature and the Public Infrastructure Advisory Commission, the department or regional transportation agency shall conduct at least one public hearing at a location at or near the proposed facility for purposes of receiving public comment on the lease agreement. Public comments made during this hearing shall be submitted to the Legislature and the Public Infrastructure Advisory Commission with the lease agreement. The director of the Office of Planning and Research or the Chairperson of the Senate or Assembly Member fiscal committees or policy committees with jurisdiction over transportation matters may, by written notification to the department or regional transportation agency, provide any objections, concerns, or comments about the proposed agreements. The department or regional transportation agency shall consider those objections, concerns or comments prior to executing a final agreement.

(d) For the purpose of facilitating those projects, the agreements between the parties may include provisions for the lease of rights-of-way in, and airspace over or under, highways, public streets, rail, or related facilities for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the construction of transportation projects. Facilities subject to an agreement under this section shall, at all times, be owned by the department or the regional transportation agency, as appropriate. For department projects, the commission shall certify the department's determination of the useful life of the project in establishing the lease agreement terms. In consideration therefor, the agreement shall provide for complete reversion of the leased facility, together with the right to collect tolls and user fees, to the department or regional transportation agency, at the expiration of the lease at no charge to the department or regional

transportation agency. At time of the reversion, the facility shall be delivered to the department or regional transportation agency, as applicable, in a condition that meets the performance and maintenance standards established by the department and that is free of any encumbrance, lien, or other claims. When evaluating a proposal submitted by the contracting entity or lessee, the department or the regional transportation agency may award a contract on the basis of the lowest bid or best value.

(e) (1) Agreements between the department or regional transportation agency and the contracting entity or lessee shall authorize the contracting entity to use a design-build method of procurement for transportation projects, subject to the following conditions:

(A) The contracting entity or lessee using the design-build method of procurement shall implement a labor compliance program, as described in Section 1771.5 of the Labor Code, or it shall provide that a third party shall implement, on the contracting entity's behalf, a labor compliance program subject to that statute. This requirement does not apply to a project where collective bargaining agreement or agreements have been entered into that bind all of the contractors performing work on the projects.

(B) The contracting entity or lessee shall ensure that the design-builder has an acceptable safety record. A contractor's safety record shall be deemed acceptable if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury/illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the bidder is a party to an alternative dispute resolution subsystem as provided in Section 3201.5 of the Labor Code.

(C) The contracting entity or lessee shall require that the design-builder provide payment and performance bonds for the project in accordance with Article 7 (commencing with Section 10220) of Chapter 1 of Part 2 of the Public Contract Code and Chapter 7 (commencing with Section 3247) of Title 15 of Division 3 of the Civil Code.

(D) The design-build contract shall require errors and omissions insurance coverage for the design elements of the project.

(2) The department is the responsible agency for the performance of project development services and construction inspection services. The department may use department employees or consultants to perform those services, consistent with Article XXII of the California Constitution. Staffing for the performance of these services shall be included in the department's capital outlay support program for workload purposes in the annual Budget Act.

(f) (1) The department or a regional transportation agency may exercise any power possessed by it with respect to transportation projects to facilitate the transportation projects pursuant to this section. The department, regional transportation agency, and other state or local agencies may provide services to the contracting entity for which the public entity is reimbursed, including, but not limited to, planning, environmental planning, environmental certification, environmental review, preliminary design, design, right-of-way acquisition, construction, maintenance, and policing of these transportation projects. The department or regional transportation agency, as applicable, shall regularly inspect the facility and require the lessee to maintain and operate the facility according to adopted standards. The lessee shall be responsible for all costs due to development, maintenance, repair, rehabilitation, and reconstruction, and operating costs.

(2) In selecting private entities with which to enter into these agreements, notwithstanding any other provision of law, the department and regional transportation agencies may utilize, but are not limited to utilizing, one or more of the following procurement approaches:

(A) Solicitations of proposals for defined projects and calls for project proposals within defined parameters.

(B) Prequalification and short-listing of proposers prior to final evaluation of proposals.

(C) Final evaluation of proposals based on qualifications, best value, or both. If final evaluation is to be based on best value, the California Transportation Commission shall develop and adopt criteria for making that evaluation prior to evaluation of a proposal.

(D) Negotiations with proposers prior to award.

(E) Acceptance of unsolicited proposals, with issuance of requests for competing proposals. Neither the department nor a regional transportation agency may award a contract to an

unsolicited bidder without receiving at least one other responsible bid.

(g) The contracting entity or lessee shall have the following qualifications:

(1) Evidence that the members of the contracting entity or lessee have completed, or have demonstrated the experience, competency, capability, and capacity to complete, a project of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project and a financial statement that assures the contracting entity or lessee has the capacity to complete the project.

(2) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(3) Evidence that establishes that members of the contracting entity or lessee have the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(4) Evidence that the contracting entity or lessee has workers' compensation experience, history, and a worker safety program of members of the contracting entity or lessee that is acceptable to the department or regional transportation agency.

(5) A full disclosure regarding all of the following with respect to each member of the contracting entity or lessee during the past five years:

(A) Any serious or willful violation of Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596).

(B) Any instance where members of the contracting entity were debarred, disqualified, or removed from a federal, state, or local government public works project.

(C) Any instance where members of the contracting entity, or its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive or were found by an awarding body not to be a responsible bidder.

(D) Any instance where members of the contracting entity, or its owners, officers, or managing employees defaulted on a construction contract.

(E) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), including, but not limited to, alleged violations of federal or state law regarding the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or Federal Insurance Contribution Act (FICA) withholding requirements.

(F) Any bankruptcy or receivership of any member of the contracting entity or lessee, including, but not limited to, information concerning any work completed by a surety.

(G) Any settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the contracting entity or lessee during the five years preceding submission of a bid under this article, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this five-year period.

(H) If the contracting entity or lessee is a partnership or any association that is not a legal entity, a copy of the agreement creating the partnership or association that specifies that all partners or association members agree to be fully liable for the performance under the agreement.

(h) No agreement entered into pursuant to this section shall infringe on the authority of the department or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation project. Lease agreements may provide for reasonable compensation to the lessee for the adverse effects on toll revenue or user fee revenue due to the development, operation, or lease of supplemental transportation projects with the exception of any of the following:

(1) Projects identified in regional transportation plans prepared pursuant to Section 65080 of the Government Code .

(2) Safety projects.

(3) Improvement projects that will result in incidental capacity increases.

(4) Additional high-occupancy vehicle lanes or the conversion of existing lanes to high-occupancy vehicle lanes.

(5) Projects located outside the boundaries of a public-private partnership project, to be defined by the lease agreement.

However, compensation to a lessee shall only be made after a demonstrable reduction in use of the facility resulting in reduced toll or user fee revenues, and may not exceed the reduction in those revenues or the amount necessary to cover the costs of debt service, including principal and interest on any debt service debt incurred for the development, operation, maintenance, or rehabilitation of the facility, whichever is less.

(i) (1) Agreements entered into pursuant to this section shall authorize the contracting entity to impose tolls and user fees for use of a facility constructed by it, and shall require that over the term of the lease the toll revenues and user fees be applied to payment of the capital outlay costs for the project, the costs associated with operations, toll and user fee collection, administration of the facility, reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, police services, and a reasonable return on investment. The agreement shall require that, notwithstanding Sections 164, 188, and 188.1, any excess toll or user fee revenue either be applied to any indebtedness incurred by the contracting entity with respect to the project, improvements to the project, or be paid into the State Highway Account, or for all three purposes, except that any excess toll revenue under a lease agreement with a regional transportation agency may be paid to the regional transportation agency for use in improving public transportation in and near the project boundaries.

(2) Lease agreements shall establish specific toll or user fee rates. Any proposed increase in those rates during the term of the agreement shall first be approved by the department or regional transportation agency after at least one public hearing conducted at a location near the proposed or existing facility.

(3) The collection of tolls and user fees for the use of these facilities may be extended by the commission or regional transportation agency at the expiration of the lease agreement. However, those tolls or user fees may not be used for any purpose other than for the improvement, continued operation, or maintenance of the facility.

(j) Agreements entered into pursuant to this section shall include provisions establishing that the contracting entity or lessee agrees to indemnify, defend, and save harmless the department and a regional transportation agency, its officers, agents, and employees

from any and all claims and losses accruing or resulting to any and all contractors, subcontractors, suppliers, laborers, and any other person, firm, or corporation furnishing or supplying services materials, or supplies in connection with the performance of the contracting entity or work associated therewith, and from any and all claims and losses accruing or resulting to a contractor, subcontractor, supplier, laborer, and any other person, firm, or corporation who may be injured or damaged in the performance of activities by or on behalf of the contracting entity or its contractors, agents, and employees.

(k) The plans and specifications for each transportation project developed, maintained, repaired, rehabilitated, reconstructed, or operated pursuant to this section shall comply with the department's standards for state transportation projects. The lease agreement shall include performance standards, including, but not limited to, levels of service. The agreement shall require facilities on the state highway system to meet all requirements for noise mitigation, landscaping, pollution control, and safety that otherwise would apply if the department were designing, building, and operating the facility. If a facility is on the state highway system, the facility leased pursuant to this section shall, during the term of the lease, be deemed to be a part of the state highway system for purposes of identification, maintenance, enforcement of traffic laws, and for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

(l) Failure to comply with the lease agreement in any significant manner shall constitute a default under the agreement and the department or the regional transportation agency, as appropriate, shall have the option to initiate processes to revert the facility to the public agency.

(m) The assignment authorized by subdivision (c) of Section 130240 of the Public Utilities Code is consistent with this section.

(n) A lease to a private entity pursuant to this section is deemed to be public property for a public purpose and exempt from leasehold, real property, and ad valorem taxation, except for the use, if any, of that property for ancillary commercial purposes.

(o) Nothing in this section is intended to infringe on the authority to develop high-occupancy toll lanes pursuant to Section 149.4, 149.5, or 149.6.

(p) Nothing in this section shall be construed to allow the conversion of any existing nontoll or nonuser-fee lanes into tolled or user fee lanes with the exception of a high-occupancy vehicle lane that may be operated as a high-occupancy toll lane for vehicles not otherwise meeting the requirements for use of that lane.

(q) The lease agreement shall require the lessee to provide any information or data requested by the California Transportation Commission or the Legislative Analyst. The commission, in cooperation with the Legislative Analyst, shall annually prepare a report on the progress of each project and ultimately on the operation of the resulting facility. The report shall include, but not be limited to, a review of the performance standards, a financial analysis, and any concerns or recommendations for changes in the future.

(r) No lease agreements may be entered into under this section on or after January 1, 2014.

SEC. 3. This act addresses the fiscal emergency declared by the Governor by proclamation on December 1, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

SEC. 5. This bill shall not become operative unless Assembly Bill 2 of the 2009–10 First Extraordinary Session is enacted and becomes operative.

Approved _____, 2008

Governor